Choo Ah Kow v Yeow Yew Thiam & Anor

HIGH COURT (KUALA LUMPUR) – SUIT NO F50 OF 1984
SITI NORMA YAAKOB J
25 APRIL 1988

Civil Procedure – Election – Defence of – Principles applicable – Principal and agent sued on same cause of action – Judgment in default of appearance obtained against agent – Whether cause of action against principal merged in default judgment – Application by principal to set aside statement of claim issued against him – Whether alternative plea of plaintiff introduced separate cause of action – Rules of the High Court 1980, O 13 r 4(1)

The plaintiff sued the first and second defendants on a sale and purchase agreement executed by him with the second defendant acting as the attorney of the first defendant pursuant to a power of attorney. Under the agreement, the plaintiff agreed to purchase the property of the first defendant and had paid a substantial portion of the purchase price to the second defendant. Subsequently, the second defendant refused to accept the balance of the purchase price tendered by the plaintiff and treated the agreement as repudiated. The plaintiff alleged that the repudiation was made without just cause and claimed specific performance of the agreement against the defendants, damages for its breach, removal of the caveat entered by the first defendant and an injunction restraining them from dealing with the property in any manner whatsoever. Alternatively, the plaintiff claimed the return of the sum of money paid to account together with interest. In due course, judgment in default of appearance was entered against the second defendant and consequent upon this judgment and relying on the doctrine of election, the first defendant applied to have the statement of claim against him set aside. The plaintiff contended that the doctrine of election did not apply as he had pleaded in the alternative that either one or both of the defendants return the money paid by him to the second defendant pursuant to the agreement.

Held, allowing the first defendant's application: (1) From the statement of claim, it was clear that the defendants were sued on the same cause of action, namely, breach of the sale and purchase agreement but as between them, the first defendant was sued as a principal and the second defendant his agent. As the second defendant was an agent of the first defendant and when judgment in default was entered against the second defendant, the plaintiff's cause of action as against the first defendant had merged in the default judgment as a result of which the plaintiff could not justifiably maintain the same cause of action against the first defendant. If actions can be brought and judgments recovered against the agent and afterwards the principal, there would be two judgments for the same debt or cause of action and this would be contrary to justice.

(2) What was pleaded by the plaintiff in the alternative was an alternative remedy, that is, the return of the money paid, which did not introduce an alternative cause of action against any of the defendants.

(3) The fact that the default judgment was entered under O 13 r 4(1) of the Rules of the High Court 1980 was immaterial. The words 'if any' therein limit the right of continuing the action against the other defendants and since the plaintiff in the instant case had exercised his option to enter judgment against the second defendant, he was barred from continuing with the same cause of action against the first defendant as the principal of the second defendant.

Cases referred to

1 *Hagemeyer Trading Co (Malaysia) Sdn Bhd* v *Gibson Trading Co* [1978] 2 MLJ 101 (refd)
2 *Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd* v *Zakaria bin Husin* [1985] 2 MLJ 287 (distd)

Legislation referred to

Rules of the High Court 1980 O 13 r 4(1)

A Krishnan for the first defendant/applicant.
C Das (*Yeo Puay Huei* (*Miss*) with him) for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: In this suit, the plaintiff's cause of action is founded on a sale and purchase agreement dated 5 February 1983 executed by him with the second defendant, acting as the attorney of the first defendant pursuant to a power of attorney dated 17 January 1983. Under the agreement, the plaintiff agreed to purchase the first defendant's 7/8 undivided share of a piece of land together with the ground floor of a building and five flats erected thereon (the property). The purchase price was agreed at $600,000 and at the time of the filing of this suit, the plaintiff had already paid $379,500 to the second defendant leaving a balance of $220,500 which the second defendant refused to accept when tendered, thereby treating the agreement as repudiated. It is this repudiation which the plaintiff now avers as having been made without just cause and he claims specific performance of the agreement against both the defendants, damages for its breach, removal of the caveat lodged by the first defendant and an injunction restraining them from dealing with the property in any manner whatsoever. Alternatively, he also claims the return of the $397,500 paid to account together with interest.

On 28 February 1986, judgment in default of appearance was entered against the second defendant and consequent upon this judgment and relying on the doctrine of election, the first defendant applied to have the statement of claim against him set aside with costs.

From the statement of claim, it is very clear that the defendants are sued on the same cause of action, namely, breach of the sale and purchase agreement but as between them, the first defendant is sued as a principal and the second defendant his agent. Now, under what circumstances can the principle of election apply?

In *Hagemeyer Trading Co (Malaysia) Sdn Bhd* v *Gibson Trading Co*,[1] Chang Min Tat FJ held that the principle applies only to a case of joint liability in the relationship of principal and agent and it can never be applied where there are two distinct and separate causes of action.

Reference was also made to the case of *Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd* v

Zakaria bin Husin,[2] where in a claim for personal injuries sustained in an accident in a forest logging area, the respondent (the plaintiff at first instance) sued all the three defendants (one being the appellant) jointly and severally and also in the alternative. He not only pleaded that at the material time he was jointly and severally employed by each of the three defendants respectively but also that the third defendant was the servant and agent of the second defendant and the latter the servant or agent of the first defendant. Under those circumstances, the Federal Court held that the respondent was not precluded from proceeding against the other defendants, including the appellant, after obtaining default judgment against the third defendant. This is so as the pleadings clearly show that the third defendant was sued jointly or severally in his capacity as the agent or the servant of the first and/or the second defendant or alternatively in his capacity as a principal. Estoppel was held not to have risen under those circumstances.

Unlike *Syarikat Perniagaan's* case,[2] the facts of the instant case are distinguishable in that there is only one cause of action, that of a breach of the agreement entered into by the plaintiff with the first defendant but executed by his lawful attorney, the second defendant. However, the plaintiff has also pleaded in the alternative that either one or both the defendants return the $397,500 paid by him to the second defendant pursuant to the agreement and it is this alternative plea which the plaintiff relies on to rebut the contention that the doctrine of election does not apply.

This I do not agree as what is pleaded by the plaintiff in the alternative is an alternative remedy ie the return of the $397,500 which he maintains he is entitled to claim in the event his prayer for the specific performance of the agreement fails. The plea does not, I consider, introduce an alternative cause of action against any of the defendants. The only cause of action pleaded is the breach of the agreement entered by the plaintiff with the first defendant as principal and the second defendant as his lawful attorney. In that capacity, the second defendant is clearly an agent of the first defendant and when judgment in default was entered against him, the plaintiff's cause of action as against the first defendant has merged in the default judgment as a result of which he cannot justifiably maintain the same cause of action against the first defendant. If actions can be brought and judgments recovered against the agent and afterwards the principal, there would be two judgments for the same debt or cause of action. This I consider would be contrary to justice.

The fact that the default judgment was entered under O 13 r 4(1) is quite immaterial as that order and rule is qualified to the extent that where a default judgment has been entered against one defendant for possession of immovable property, the plaintiff can still proceed with the action against the other defendants, if any. The words 'if any' limit the right of continuing the action against the other defendants and since the plaintiff in the instant case had exercised his option to enter judgment against the second defendant, he is barred from continuing with the same cause of action against the first defendant as the principal of the second defendant.

On that reasoning, I had accordingly allowed the first defendant's application with costs and ordered that the statement of claim against him be struck off.

Order accordingly.

Solicitors: *James Foong & Anad*; *Shook Lin & Bok*.

Reported by *Teo Keang Sood*

Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd

HIGH COURT (JOHORE BAHRU) – COMPANIES WINDING UP NO 42-132-87
ZAKARIA YATIM J
14 APRIL 1988

Companies and Corporations – Winding-up petition – Application for petition to be struck off – Alleged debt disputed – Whether petitioner is really the creditor – Companies Act 1965, ss 217 & 218(2)(a)

Civil Procedure – Winding-up petition – Locus standi – Rules of the High Court 1980, O 18 r 19

Civil Procedure – Winding-up petition – Application for order to strike out petition under O 18 r 19(1)(d) of the Rules of the High Court 1980 – Affidavit evidence admissible – Rules of the High Court 1980, O 18 r 19(1)(d)

This is an application by the respondent company for an order of the court that the petition filed by the petitioner to wind up the respondent company be struck off under O 18 r 19 of the Rules of the High Court 1980. The respondent contended that the alleged debt arose from breaches of contract on the part of the respondent company and that in fact, the petitioner had a debit balance.

Held, allowing the respondent's application: (1) It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent company is a debtor.

(2) From the evidence, it is clear that the respondent company disputed the alleged debt claimed by the petitioner. Indeed, the respondent company claimed that the petitioner is in a debit balance. In the circumstances, the petitioner is not a creditor as envisaged in s 217 of the Companies Act 1965.

(3) The petitioner is not entitled to file the petition as it has no *locus standi*. The action of the petitioner in filing the petition is an abuse of the process of the court.